Supreme Court, U.S.
FILED
MAY 29 2001
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(6)

No. 00-1406

# In the Supreme Court of the United States

CHEVRON U.S.A., INC., PETITIONER,

*v.*

MARIO ECHAZABAL, RESPONDENT.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## REPLY BRIEF FOR THE PETITIONER

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Echazabal virtually concedes the certworthiness of this case, which he acknowledges presents a "specific" and "basic legal" issue concerning a key federal statute. Opp. 7, 8. He says nothing to refute Judge Trott's dissent, which demonstrated that Judge Reinhardt's majority opinion is a "bizarre" contortion of the ADA that cannot be squared with Congress's intent to protect disabled persons. He admits (at 8) that the majority held "invalid" a regulation of the EEOC, the agency charged with implementing Title I of the ADA. That the Ninth Circuit's "Pickwickian ruling" struck down a longstanding and authoritative administrative regulation makes review especially appropriate. *E.g.*, *FERC* v. *Martin Exploration Mgt.*, 486 U.S. 204, 208 (1988).

Echazabal repeatedly mischaracterizes the issue presented. The question is not whether an employer may refuse to hire a person whose health would deteriorate "at some indeterminate point in the future." Opp. 15. The district court found that Chevron was entitled to rely on currently available medical evidence, all of which showed that Echazabal would face a "serious, immediate risk" in the plant helper job. Pet. App. 47a; see Pet. 6. The Ninth Circuit did not disagree, basing its decision instead on the unprecedented "legal" ground that danger to the employee's own health is simply irrelevant. Opp. 7. Consequently, nothing in the procedural posture of this case requires this Court to accept as true the post hoc rationalizations of the doctors Echazabal hired for this litigation. Opp. 1 n.1. Given the rulings below, the *only* issue is whether a person who is at imminent risk of serious harm from performing the essential functions of the job must be hired under the ADA.

Like Judge Reinhardt, Echazabal asserts that the Ninth Circuit's decision was compelled by *Johnson Controls* and *Dothard*. Pet. App. 10a, 15a n.9. That serious misinterpretation of this Court's precedents only confirms the need for this Court's review. Those Title VII cases disapproved the use of gender "stereotypes" that affected broad classes of persons on an indiscriminate basis. This ADA case does not involve gender or any use of stereotypes. Echazabal was found unfit for the job

he sought by his own physician and several specialists in industrial medicine based on his particular health condition and the unusual characteristics of the job. This Court should grant review to correct a patent over-extension of its prior decisions.

Most astonishing is Echazabal's claim (at 10) that there is no "serious conflict" among the circuits. Even Judge Reinhardt acknowledged the existence of a conflict. Pet. App. 6a. In arguing there is none, Echazabal misapprehends the meaning of "conflict." "Cases are properly regarded as conflicting if it can be said with confidence that another circuit would decide the case differently because of language in an opinion in a case having substantial factual similarity." R. Stern *et al.*, Supreme Court Practice 355 (7th ed. 1993). Where a different legal standard requiring a different ruling is announced in a "very similar case coming from another lower court," there is an undeniable conflict. W. Rehnquist, The Supreme Court 265 (1987). Based on the clearly stated standard used in several other circuits in closely similar circumstances, this Court can conclude with confidence that the present case would be decided differently in those circuits. Given the exceptional practical importance of this conflict, which has caused widespread confusion in the business community as to how to comply with the ADA—as reflected in the three *amicus curiae* briefs filed in this case—certiorari should be granted.

1. Echazabal concedes (at 13) that the Eleventh Circuit's decision in *Moses* is a "pure threat-to-self case" that directly conflicts with the ruling below. The Ninth Circuit acknowledged that conflict. Pet. App. 6a, 23a-24a. Echazabal's assertion that the conflict is not "serious" is baffling. The *only* risk identified in *Moses* was the "grave risk" to the epileptic plaintiff from doing the job he sought; the court of appeals explicitly relied on the EEOC's "direct threat" regulation in holding that "[a]n employer may fire a disabled employee if the disability renders the employee a 'direct threat' to his own health or safety"; and the court affirmed entry of summary judgment for



the employer on that basis. 97 F.3d at 447-448. Clearly, the Eleventh Circuit would have decided the present case differently, and it treated the controlling EEOC regulation as authoritative, not "invalid" like the Ninth Circuit here. See also *Blue Cross Blue Shield*, 30 F. Supp. 2d at 306-307 (direct threat defense applied where the *only* risk was to the employee himself).[1]

2. Echazabal concedes as well (at 11) that the Fifth, Tenth, and Eleventh Circuits have held that the direct threat defense covers threats to "the health or safety of the individual *or* others" in cases in which an employee's medical condition resulted in a threat to the employee *and* others. *Borgialli*, 235 F.3d at 1290-1294 (summary judgment for employer that fired employee with psychiatric disorder who "threatened suicide and perhaps injury to others," citing *Moses* and EEOC's regulation); *LaChance*, 146 F.3d at 834-836 (summary judgment for employer that fired epileptic cook whose use of slicing machines and hot items threatened "harm to himself or others"); *Daugherty*, 56 F.3d at 698 (judgment for employer; "the ADA by its terms recognizes the same" "personal safety requirement" as the Rehabilitation Act—that an employee not "'endange[r] the health and safety of the individual or others'").

Echazabal's assertion that these cases "create no meaningful conflict" because they do not turn "solely on the basis" of a threat to self is flatly incorrect. Opp. 11. These decisions rest on a *disjunctive* test—harm to the individual *or* others—and were thus decided on the basis of a legal rule that would dictate a different result in the present case. Echazabal's speculation that these circuits might abandon this legal rule if faced with a case involving a threat only to self finds no support in any of the

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[1] *Lowe* v. *Alabama Power*, 244 F.3d 1305 (11th Cir. 2001), casts no doubt on *Moses*. In *Lowe*, the plaintiff urged the court of appeals "to reverse [its] holding in *Moses*," but the court declined even to consider that argument, ruling on other grounds. *Id.* at 1306.

opinions and ignores the EEOC's unambiguous regulation. In each case the threat to the employee himself provided the basis for an alternative holding, and "where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, * * * each is the judgment of the court." *United States* v. *Title Ins. Co.*, 265 U.S. 472, 486 (1924).

3. Contrary to Echazabal's suggestion (at 18), the Ninth Circuit clearly held that the direct threat defense is the "exclusive" way in which safety may be taken into account under the ADA, reasoning that to take safety into account in other ways "would undermine the clear language of the ADA's direct threat provision." Pet. App. 14a, 16a n.10 (rejecting arguments "that a personal safety requirement is a valid qualification standard" and that a person is not a "qualified individual" "if her employment would pose 'a reasonable probability of substantial harm' to her"). The petition (at 17-18) showed that this holding conflicts with rulings of the First, Fifth, and Seventh Circuits that "safety requirements are not exclusively cabined into the direct threat test" (*Exxon*, 203 F.3d at 873), but may also prevent a person from being "qualified" under § 12112(a) or form the basis of § 12113(a) "qualification standards."

In an effort to explain away the Seventh Circuit's decision in *Koshinski*, Echazabal falsely states that the employee there was "presently unable to perform the tasks of his job" and was unqualified for that reason. In fact, the employee could physically perform the job—with pain he said he was willing to bear. But the "job required him to do all of the things his doctors recommended he refrain from doing" because they would "exacerbate his condition." 177 F.3d at 601; see *id.* at 603 ("there was no way to do the job * * * without subjecting himself to the very things his doctors recommended he stay away from"). The only reason the court identified why the employee was not a "qualified individual" was doctors' recommendations that he avoid the vibration and repetitive tasks necessarily involved in the job because these would "cause his



condition to worsen." *Id.* at 602-603. The Seventh Circuit would have found Echazabal not "qualified" on the same basis. *Koshinski* is in direct conflict with the Ninth Circuit's ruling that Echazabal's liver condition did not prevent him from being qualified for the plant helper job that would harm or kill him. See also *Foreman* v. *Babcock & Wilcox Co.*, 117 F.3d 800, 803, 807-808 (5th Cir. 1997) (person not "qualified" for job around high voltage electrical equipment that would interfere with his heart pacemaker).[2]

Echazabal's attempted distinction (at 18-20) of *Exxon* and *Amego* because they involve "risk to *others*" is erroneous. The Fifth Circuit in *Exxon* rejected the contention that "the direct threat test must be used *in every case* where a safety-based requirement is at issue" (203 F.3d at 873, emphasis added), holding in equally broad terms that "where an employer has developed a general safety requirement for a position, safety is a qualification standard no different from other requirements defended under the ADA's business necessity provision." *Id.* at 874. The Fifth Circuit thus plainly would analyze as a "qualification standard" an employer's requirement that an employee not pose a serious risk to his *own* health or life—the requirement Chevron imposed when it described the "physical/environmental demands" for the plant helper job to include ability to work with specified liver toxins. See Pet. 5-6. The First Circuit's decision in *Amego* that posing a threat to others rendered a person not "qualified" rested on the court's determination that the meaning of "qualified" in the ADA is the same

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[2] This case is *not* "directly analogous" to that of an employee who is fired "because his degenerative heart disease makes a future heart attack inevitable," a situation *Koshinski* distinguished. Opp. 17; 177 F.3d at 603. Here, the medical opinions showed that Echazabal's disease would be exacerbated by doing the *particular* job and that contact with the chemicals in the plant would injure or kill him, perhaps quite quickly.

as in the Rehabilitation Act and its implementing regulations. 110 F.3d at 143-144. The Rehabilitation Act definition excluded persons who would "endange[r] the health and safety of the individual." 29 C.F.R. § 1614.203(a)(6), Pet. App. 61a.

*Koshinski*, *Exxon* and *Amego* conflict directly with the Ninth Circuit's refusal to consider safety issues outside the confines of the "direct threat" defense. Because the Ninth Circuit interpreted that defense to exclude risk to self, in the Ninth Circuit even the most grievous medical risk to the employee can *never* be a factor under the ADA. Pet. App. 16a & n.10. This Court "questioned" the view that the direct threat defense is the exclusive way that "safety-related qualification standards" may be justified in *Albertson's*, 527 U.S. at 569 n.15. This case provides the ideal occasion to address that question and the proper ADA analysis of risk to self.

4. *Amego's* reliance on the Rehabilitation Act reflects the fact that the statutes are to be construed *in pari materia* because "existing language and standards from the Rehabilitation Act were incorporated into the ADA." Statement of President Bush, 1990 U.S.C.C.A.N. 601 (July 26, 1990); *Bragdon*, 524 U.S. at 645 (Congress in the ADA adopted the "administrative and judicial interpretations" of the Rehabilitation Act). Echazabal concedes (at 11-12) that Rehabilitation Act cases routinely hold that a person who in doing a job would pose a substantial risk to "the health or safety of the individual *or* others" is not "qualified." Those include cases in which the principal risk is to the employee himself. *E.g.*, *Chiari*, 920 F.2d at 317 (applying the legal rule that "a significant risk of personal injury can disqualify a handicapped individual from a job"). Furthermore, the Seventh Circuit in *Knapp* squarely held a student with a heart condition not "qualified" under the Rehabilitation Act for a university's sports program *solely* because of the risk he would die. 101 F.3d 473. Echazabal seeks to distinguish *Knapp* because it did not involve employment (Opp. 12 n.4), but Rehabilitation Act § 504's unitary concept of a "qualified"



person equally governs employment; *Knapp* relies primarily on employment precedents, including *Chiari* (see101 F.3d at 483); and Echazabal elsewhere recognizes that non-employment precedents establish standards applicable in the employment context. See Opp. 6 (*Bragdon*, a public accommodation case, establishes the standards for determining if a direct threat exists). Had Congress intended a different result under the ADA it would have said so rather than making minor adjustments —greatly over-dramatized by respondent (at 27)—that are fully *consistent* with the Rehabilitation Act approach. The Ninth Circuit's express rejection of settled Rehabilitation Act law (Pet. App. 16a n.10) provides a further reason for this Court's review.

5. The numerous decisions discussed above and in the petition show that the problem of individuals seeking jobs that will harm or even kill them is a frequently recurring one. Respondent's quibbling distinctions of the cases cannot obscure the pervasive confusion among the courts of appeals as to how such a situation is to be analyzed under the ADA. That uncertainty has profound implications for employers faced with making decisions in life and death situations, who cannot be expected to fathom the micro-distinctions urged by respondent. As the *amicus* briefs filed on behalf of thousands of employers attest, businesses with nationwide operations do not know how to operate when EEOC regulations and courts of appeals around the country state that they may legitimately be concerned about the life and health of their employees, but the Ninth Circuit declares that such concerns are "paternalistic" and unlawful. The predicament of employers is worsened by stringent OSHA and state laws that severely punish employers who fail to protect their workers. The intolerable legal uncertainty that arises from the Ninth Circuit's ruling, and the moral quandary in which it places businesses that seek to protect employees from harm, create a pressing need for clarification by this Court.

6. On the merits, Echazabal parrots the Ninth Circuit's *expressio unius* argument without coming to grips with the plain language of ADA § 12113(b) that a qualification standard "may include" a requirement that others not be put at risk. Echazabal offers no response to decisions of this Court (see Pet. 22-23) establishing that this sort of reference to one possible defense, stated in non-exclusive terms, does not negate other defenses available to the employer. We question, as this Court did in *Albertson's*, whether the EEOC has any statutory basis for its litigating position *limiting* consideration of safety qualifications to the direct threat defense. But that is a different question from whether it is reasonable for the EEOC to *include* threat to self in the direct threat defense. The EEOC regulation providing that one proper qualification standard is the absence of a "direct threat" to self is a perfectly reasonable interpretation of § 12113(a) and (b) that is entitled to deference. *EEOC* v. *Commercial Office Prods.*, 486 U.S. 107, 115 (1988) ("EEOC's interpretation [of a statute] for which it has primary enforcement responsibility * * * need only be reasonable to be entitled to deference"); *Chevron*, 467 U.S. at 843 n.11; see Pet. 28-29.

Echazabal's contention (at 23-25) that anyone who can perform the tasks associated with a job is "qualified"— regardless of whether doing those tasks will seriously harm or kill him—contorts the plain language of the ADA and Congress's purpose to protect persons with disabilities. A "qualified individual" is one who "can perform the essential functions" of the job. § 12111(8). The prospective focus of this language demonstrates that someone who *cannot* perform essential functions on a continuing basis because doing the job will sicken or kill him is not "qualified." At the very least, the statute is silent on the question whether a person who cannot perform the job without serious risk to his health or life is "qualified." It is Echazabal who would rewrite the law to say that a person is "qualified" if he "can perform the essential functions of the job, whether or not those functions would kill or injure him." Congress did not so declare.



Moreover, § 12111(8) mandates consideration of "the employer's judgment as to what functions of a job are essential," especially as evidenced by a written job description (like the one Chevron prepared here). There is no sign that Congress meant to preclude an employer from stipulating that an essential function of a position is the ability to perform it safely. At the time Congress drafted this language, it had long been established that "protecting employees from workplace hazards * * * qualif[ies] as an important business goal." *Fitzpatrick* v. *Atlanta*, 2 F.3d 1112, 1119, 1127 (11th Cir. 1993) (reassigning firemen with a disease that prevented them from shaving did not violate the Rehabilitation Act; a clean shave was critical to the effective use of breathing equipment and *"[p]erforming the essential functions of a job means * * * being able to perform those functions without risk of serious physical harm to oneself"*) (emphasis added). Congress in the ADA allowed employers to adopt "physical criteri[a]" that are "consistent with business necessity" (S. Rep. No. 101-116, at 27), while outlawing discrimination based on "patronizing attitudes, ignorance, [and] irrational fears." H.R. Rep. No. 101-485 (Pt. 2), at 30. The Ninth Circuit's insistence that denying employment to a person whom doctors say will be hurt or killed by the job falls on the forbidden side of that line makes nonsense of Congress's overarching purpose to help, not harm, disabled people.

7. Echazabal admits that this case does not turn on any factual dispute: the Ninth Circuit's ruling depends not on any "fact-specific question" about whether he would really be harmed in the plant helper position but on a "basic *legal*" question regarding the meaning of the ADA. Opp. 7. The erroneous legal interpretation adopted by Judge Reinhardt made injury to Echazabal wholly irrelevant.

Respondent nevertheless tries to minimize the danger he faced by citing the post hoc conclusions of doctors hired by his lawyer for this litigation. There is no doubt, however, that Chevron's decision was reasonably based on the objective

medical evidence available to it at the time—which the authorities cited by respondent hold is all that is required. See Opp. 6; *Bragdon*, 524 U.S. at 649-650 (the employer's "risk assessment must be * * * reasonable in light of the available medical evidence"); *Lowe*, 244 F.3d at 1309 ("The key inquiry is whether the employer made a reasonably informed and considered decision * * * 'based on particularized facts,'" which includes "justifiable reliance on a physician's diagnosis"). As the district court found and the court of appeals did not question, "[a]ll the medical opinions which specifically contemplated Echazabal's employment in the position of plant helper, and which were relied upon and available to Chevron at the time of its decision * * *, regarded any exposure to hepatotoxic chemicals, including those to which Echazabal would be exposed in the position of plant helper, as posing a serious, immediate risk to him." Pet. App. 47a; see Pet. 6-7. Those included the opinions of three Chevron physicians experienced in industrial medicine, who concluded that small exposures to liver toxins over a long period would worsen Echazabal's condition and a large exposure from a relief valve discharge or other event could "cause death." Pet. 6. They also included the oral opinion of Echazabal's own doctor, which far from being "ambiguous" (Opp. 4 n.3), was "that Echazabal should not be exposed to" "substances present in the refinery." Pet. App. 37a. Echazabal's doctor subsequently confirmed in writing that *"of course"* Echazabal should not work in a "job [that] 'may entail exposure to hepatotoxic hydrocarbons.'" *Ibid.* (emphasis added). Chevron had no basis to doubt what occupational medicine specialist Dr. Tang concluded a few weeks later: "exposure to liver toxins would harm and probably kill Echazabal," perhaps from "massive hepatic failure in a few hours." C.A. Supp. App. 41a-42a.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2001